

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

LESLIE BRIGGS, as next friend)
of T.W. and B.S.; EVAN WATSON,)
as next friend of C.R.; and,)
HENRY A. MEYER, III, as next)
friend of A.M., for themselves)
and for others similarly situated,)

Plaintiffs,)

v.)

Case No. 23-cv-81-GKF-JFJ

ALLIE FRIESEN, in her official)
capacity as Commissioner of the)
Oklahoma Department of Mental)
Health and Substance Abuse)
Services; and DEBBIE MORAN, in)
her official capacity as Interim)
Executive Director of the Oklahoma)
Forensic Center,)

Defendants.)

TRANSCRIPT OF STATUS HEARING

BEFORE THE HONORABLE GREGORY K. FRIZZELL

UNITED STATES DISTRICT JUDGE

NOVEMBER 1, 2024

REPORTED BY:

BRIAN P. NEIL, RMR-CRR
United States Court Reporter

A P P E A R A N C E S

Frederic Dorwart, Paul DeMuro, and David W. Leimbach, Attorneys at Law, Frederic Dorwart Lawyers, 124 East 4th Street, Tulsa, Oklahoma, 74103, attorneys on behalf of the Plaintiffs;

Nicholas Southerland, Attorney at Law, Oklahoma Disability Law Center, 5555 East 71st Street, Suite 9100, Tulsa, Oklahoma, 74136, attorney on behalf of the Plaintiffs;

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Garry M. Gaskins , II, Attorney at Law, Drummond Law Firm, 1500 South Utica Avenue, Suite 400, Tulsa, Oklahoma, 74104, attorney on behalf of the Defendants;

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Friday, November 1, 2024

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DEPUTY COURT CLERK: This is Case No.

23-cv-081-GKF-JFJ, Leslie Briggs, et al., v. Allie Friesen, et al. Counsel, would you please state your appearances for the record.

MR. DEMURO: Good afternoon. May it please the court, on behalf of the plaintiffs here as preliminarily approved class counsel Paul DeMuro, Frederic Dorwart, Nick Southerland, and Brian Wilkerson. Also with us today is my partner, David Leimbach, and we've got the lead named plaintiff, Leslie Briggs, here as well, Your Honor.

THE COURT: Good afternoon.

MR. DRUMMOND: Good afternoon, Your Honor. Present with me is Solicitor General Garry Gaskins, Assistant Solicitor General Will Flanagan and Senior Assistant Attorney General Erin Moore. Also present in their official capacities are Commissioner of Mental Health Allie Friesen and Executive Director of the Forensic Center Debbie Moran.

THE COURT: Good afternoon.

MR. DRUMMOND: And to the extent there's also counsel in the room, I object to them entering their appearance for purposes of this hearing.

THE COURT: Very well. Good afternoon. And we have counsel who have entered their appearance for the defendants in

1 their official capacity. There have been two motions filed
2 today that address that representation. But for the record,
3 Mr. O'Connor or Mr. Inbody?

4 **MR. O'CONNOR:** Your Honor, Bill O'Connor, Brian
5 Inbody, John Richer for Commissioner Friesen and Interim
6 Executive Director Ms. Moran.

7 **THE COURT:** Good afternoon. We have one issue that
8 we can address, I believe, without getting into representation,
9 and we'll do that.

10 But, first of all, given that the contingency review
11 board has disapproved the proposed consent decree, do counsel
12 agree that the court should strike the January 15th, 2025,
13 final approval and fairness hearing and direct the plaintiffs
14 to provide notice that the hearing has been stricken?

15 **MR. DRUMMOND:** Your Honor, I'll address that. The
16 order -- the protocol in the State of Oklahoma is that when the
17 attorney has reached a point at which it seeks contingency
18 review board approval, it asks the governor to convene such
19 board.

20 In this case, the objection period is still open until,
21 I believe, December 7th. Therefore, I have deemed it not ripe
22 to request a contingency review board to convene to approve or
23 disapprove the preliminary proposed consent decree. So I would
24 -- and what I anticipate doing is if there are no objections,
25 then I will request the governor convene it.

1 I think you and I and all people in this courtroom know
2 that the matter's baked. The governor has no interest in
3 approving anything that would benefit the state. So we can
4 anticipate that he would deny it after I ask the board to be
5 convened. So it leaves the court in somewhat of a conundrum
6 but that's why you get paid the big bucks.

7 **THE COURT:** Well, frankly I don't know that I'm in a
8 conundrum. I had asked the plaintiffs on August 15th at the
9 hearing on the joint motion for preliminary approval of the
10 consent decree whether or not the court could enter judgment
11 prior to satisfaction of Section 200 and you and I engaged in
12 the following exchange.

13 You said, "We do think the appropriate protocol is to
14 do the preliminary consent. I've conferred with the Speaker of
15 the House, the Senate Pro Tempore, and the Governor's office on
16 the protocol, and the state is in agreement that we would
17 request the court to enter the preliminary approval subject to
18 legislative approval or the contingency review board.

19 "I think that they are seeking a threshold by this
20 court, that the court is satisfied on a threshold basis of the
21 parties' stipulated consent decree. Then with that, with the
22 parties' agreement and the court's preliminary approval, then
23 proceed with the formal approval."

24 And then I interjected, "So you would contemplate the
25 approval by the contingency review board prior to the court

1 entering judgment?"

2 And you said, "Yes."

3 And then I said, "Okay."

4 Then you said, "That would be the request of the
5 parties."

6 But you're saying that your understanding of Section
7 200 is that you have to request as attorney general the review
8 by the contingency review board and that the governor can't do
9 that as chairman of the --

10 **MR. DRUMMOND:** No. He can do whatever he wishes and
11 he has twice already. He's not given me notice to present or
12 be present either time other than the day before.

13 **THE COURT:** Well, does the statute require that?

14 **MR. DRUMMOND:** No, no requirement for notice. Like
15 I said, I think the cake's baked. I mean, he has no interest
16 in approving this.

17 **THE COURT:** All right. But given that, as a
18 practical matter, we have a hearing set January 15th and that's
19 before the legislature convenes. I need to strike that January
20 15th hearing because you don't have approval of the contingency
21 review board and the governor has convened that board and they
22 have voted 0-1, with one vote abstaining, to disapprove;
23 correct.

24 **MR. DRUMMOND:** Correct.

25 **THE COURT:** All right. So the court will then

1 strike the hearing --

2 **MR. DEMURO:** Might I be heard on that first?

3 **THE COURT:** Oh, of course.

4 **MR. DEMURO:** As Your Honor knows, and the purpose of
5 the hearing reflects, this case involves the intersection
6 between the merits -- a Rule 23 consent decree and the merits,
7 which is the broken competency restoration system and politics.

8 **THE COURT:** You're talking about the January 15th
9 hearing?

10 **MR. DEMURO:** Yes. Absolutely.

11 *(Discussion held off the record)*

12 **MR. DEMURO:** And, Your Honor, given -- I want to
13 answer your question directly, and my answer is no, but. But
14 given the really unique situation that we're in, I would ask
15 the court just a slight indulgence for me to explain what I
16 think the context of your question deserves, please, Your
17 Honor.

18 What has occurred here is extraordinary in this regard.
19 The commissioner, who now is in the courtroom personally
20 present, has asked to replace the attorney general as her
21 attorney, and in so doing, Your Honor, filed a paper that
22 conceded that the competency restoration system is broken and
23 in need of reform and conceded that the consent decree -- a
24 consent decree is the appropriate mechanism to fix it.

25 And so --

1 **THE COURT:** I believe the governor had stated in
2 remarks, what, before the legislature, the State of the State,
3 that it needs to be fixed; correct?

4 **MR. DEMURO:** Correct. And so from the plaintiff's
5 perspective, Your Honor, now the preliminary class counsel of
6 somewhere between 250 and 300 people that were languishing in
7 our county jails, there's essentially a concession from the
8 commissioner herself in her personal and official capacity that
9 the due process rights of 250 to 300 people are currently being
10 violated.

11 **THE COURT:** Well, but the devil's in the details as
12 usual; correct?

13 **MR. DEMURO:** It is, Your Honor. And so what are
14 those details? The details that have been provided by the
15 commissioner are invalid. She suggests in her paper that
16 there's really one issue and it has to do with the provision of
17 the statewide jail-based restoration.

18 Now, without getting into all of those details, the
19 commissioner posits that under this consent decree the
20 commissioner will be deprived of her statutory authority to
21 provide class members with in-jail restoration services while
22 they reside in jail.

23 That pronouncement is false and I can walk through the
24 consent decree itself which specifically reserves to the
25 department the right to provide whatever mental health services

1 they deem appropriate to any class member in jail, including
2 services under the competency restoration statute,
3 notwithstanding any other provision in the consent decree.

4 How we got here, Your Honor, was that the prior
5 commissioner rolled out a statewide in-jail restoration program
6 that was a sham and that has now been conceded by the
7 department as being a sham, as being misleading to the public,
8 false statements to the public, to district attorneys, to
9 stakeholders that there was an in-jail restoration program
10 statewide when there wasn't. There has been a history of
11 incompetence, head-in-the-sand management techniques,
12 narcissism, and sheer lack of --

13 **THE COURT:** Let's dial some of this invective down,
14 all right?

15 **MR. DEMURO:** I will. Here's my point, Judge.

16 As the preliminary class counsel of these 250 people,
17 I'm on the one-yard line. I've got the defendants admitting
18 that there should be a consent decree and that there is a
19 broken system and the consent decree is the model to fix it, a
20 consent decree. They're quibbling about one point which
21 doesn't even exist truly.

22 So here's my -- so that's the context. We're on the
23 one-yard line, Judge. We've worked long and hard for this
24 consent decree --

25 **THE COURT:** Except you've got to deal with Section

1 200.

2 **MR. DEMURO:** We do.

3 **THE COURT:** The contingency review board has
4 disapproved it.

5 **MR. DEMURO:** It has. But the game's not over.

6 **THE COURT:** I understand.

7 **MR. DEMURO:** The game's not over, Judge. Two of the
8 members of the contingency review that voted, one who
9 abstained, are outgoing leadership -- outgoing members of the
10 legislative leadership --

11 **THE COURT:** I understand.

12 **MR. DEMURO:** -- who had previously, at least one of
13 them, blocked a joint resolution being forwarded to the
14 legislature when they were session.

15 So I think the court should, number one, keep the
16 hearing date set because that allows us the opportunity to
17 continue to work with whatever legitimate concerns the
18 governor's office might have about the present consent decree
19 because we're on the one-yard line and give us some more time
20 before taking that hearing off.

21 Because I concede that absent legislative approval, be
22 it contingency review board or joint resolution of the
23 legislature, this court cannot grant final approval.

24 **THE COURT:** It would be void by terms of the
25 statute.

1 **MR. DEMURO:** Correct. But at this procedural
2 juncture, we're not yet at the final hearing. As we have seen,
3 there is a fast pace to these events, Judge. So I am imploring
4 the court --

5 **THE COURT:** The pace has been pretty quick just this
6 morning.

7 **MR. DEMURO:** Exactly, exactly. And I expect that
8 there shall be more discussions. I'm implying the court in the
9 context of an admitted broken system, essentially conceded
10 daily violations of my clients' due process rights, a
11 well-crafted consent decree that is a wise plan, the devil is
12 in the details, that has already been preliminary approved, to
13 give us some more time to work the political problem.

14 **THE COURT:** Help me out with the timeline because
15 the legislature usually doesn't convene until early February;
16 correct? So when does the new speaker and the new president
17 pro tem take office?

18 **MR. DEMURO:** Yes. Well, I'm not a legislative
19 expert but my understanding is --

20 **THE COURT:** It's important to know that.

21 **MR. DEMURO:** Yes. They get sworn in before then but
22 the joint resolution couldn't be presented until the full
23 legislature is back in session in early February. So --

24 **THE COURT:** All right. Well, I thought you were
25 going to suggest that a new contingency review board could

1 review it prior to January 15th and --

2 **MR. DEMURO:** That could happen too. I'm sorry. I
3 didn't mean to interrupt. Yes, that could happen.

4 **THE COURT:** So that's why I'm asking: When does the
5 new speaker take office? When does the new president pro tem
6 take office?

7 **MR. DRUMMOND:** May I assist?

8 **MR. DEMURO:** Yes. Sure, Your Honor.

9 **MR. DRUMMOND:** The new officers take oath of office
10 November 13th of 2024. Bills are introduced on November 15th.
11 The new term for the legislature begins on November 20th under
12 Oklahoma State Statute 14 Section 80.35.11. Then the first
13 organizational day is January 7th. So the contingency review
14 board --

15 **THE COURT:** But don't the bodies have to elect the
16 speaker and the president pro tem?

17 **MR. DRUMMOND:** They do so on the 13th of November.

18 **THE COURT:** On the 13th. And they're in session in
19 November?

20 **MR. DRUMMOND:** They are -- they are the new speaker
21 of the house and the new president pro tem my understanding is
22 November 13th.

23 **THE COURT:** So you're saying the bodies have given
24 preliminary approval and have elected to them take to take
25 office on November --

1 **MR. DRUMMOND:** The newly elected representatives and
2 senators are sworn in on November 3rd.

3 **THE COURT:** I see.

4 **MR. DRUMMOND:** That day they vote on their
5 organizational structure. That day we will have a new speaker
6 and a new president pro tem.

7 It is my suggestion that following the objection
8 period, I seek contingency review board convening and vote.
9 Now, the governor may very well block that. I anticipate if he
10 thinks that he might lose, he'll block it, so we may still be
11 at the point where we have to substantively try this case. But
12 I suggest, and I join my adversary, Mr. DeMuro, in suggesting,
13 that the court has the ability to pause, striking the January
14 hearing date. There may, in fact, be a contingency review
15 board that convenes and approves what is in the best interest
16 of the State of Oklahoma.

17 **THE COURT:** All right. A subissue, it's been
18 suggested to me -- and I don't know what the answer to this is
19 -- that once the contingency review board has disapproved it,
20 they can't go back and approve, that the process would have to
21 start back at the beginning. Now, I don't know what sense that
22 makes. Have you thought about that?

23 **MR. DRUMMOND:** I've read that statute and the
24 related sections, and I'm not aware that we're now permanently
25 blocked into perpetuity. That's not how I read it.

1 **THE COURT:** Yeah. I've reread it and I'm not
2 persuaded either of that.

3 Mr. DeMuro, your thoughts?

4 **MR. DEMURO:** Not only is it not in the statute, it's
5 not in any cases, the few that there are, if any. So I agree
6 that there's no permanent effect to the contingency review
7 board that they can't revisit their decision at any time,
8 including when's there new constituents of the review board.

9 So we're in this -- we're in --

10 **THE COURT:** You're having difficulty with that mic.

11 **MR. DEMURO:** Yeah. I'm trying to -- there we go.
12 How about that? Is that better?

13 **THE COURT:** Yeah.

14 **MR. DEMURO:** I'll just hold it.

15 So, Judge, this is a very unique procedural posture,
16 and as I started my comments, the intersection between the
17 necessity for political approval and the merits of what I now
18 believe have been confessed an ongoing constitutional violation
19 of hundreds of Oklahomans.

20 And given the unique posture where we have a
21 contingency review board whose constituents are going to be new
22 in a month or less, several weeks or less, given the fact that
23 we have a potential new legislative session coming up in
24 February, given the fact that we're on the one-yard line,
25 Judge, and we all invested a lot here, my plea to the court is

1 what motivates people to give reasonable judges pressure,
2 pressure. So I beseech the court to keep this hearing
3 scheduled as scheduled. If we reach an impasse that I think is
4 insurmountable we'll notify the court and strike the hearing.
5 I don't think it's insurmountable.

6 I will end this part of my remarks with one comment.
7 If you do strike this hearing, Judge, which I strongly
8 obviously do not want the court to do, I want as quick a
9 setting as possible for a TRO and a preliminary injunction that
10 the court will permit because we're ready to proceed on that
11 basis as well for full-tilt adversarial litigation.

12 *(Discussion held off the record)*

13 **THE COURT:** All right. It would seem to me that to
14 the extent that we -- and this is without briefing on the
15 issue -- but just for my understanding of the statute having
16 reviewed it, I don't think anything would preclude a newly
17 constituted contingency review board from reviewing it and
18 approving it or the legislature once convened reviewing it and
19 approving it. The difficulty, however, is if changes are made
20 to the proposed consent decree, then you would have to start
21 the process over. Agreed?

22 **MR. DEMURO:** I agree that if there are anything -- I
23 mean, change a comma maybe -- but if there are material changes
24 to provisions --

25 **THE COURT:** Material changes.

1 **MR. DEMURO:** Yes. Yes, Judge. The process being --

2 **THE COURT:** And everyone here, frankly, is in
3 agreement that changes -- well, that this competency
4 restoration system needs to be improved and fixed, everybody.
5 The governor has stated it. It's been stated here. I think
6 the attorney general told me at an earlier hearing that the
7 governor stated in a State of the State speech that it needs to
8 be fixed. Everybody's in agreement.

9 But there are details that are a part of this consent
10 decree, one of which I have found is not authorized by statute,
11 that being out-of-custody restoration. Not that it's a bad
12 idea. That's left to the legislature. But I think you
13 probably are right. I think that to the extent that you could
14 get a newly constituted contingency review board to approve it
15 prior to January 15th, we could go ahead.

16 **MR. DEMURO:** Yeah, I agree, Your Honor. And one
17 other comment. There's no prejudice to my class in the court
18 maintaining, at least for now, that hearing date. In fact, I
19 think it would benefit the class for the reasons that I've
20 discussed. I think having a firm date will motivate our
21 ability to bring people together to close this out. There's no
22 prejudice to those stakeholders who want to submit comments
23 and, in fact, I welcome that. Actually I'd get more input and
24 more comments.

25 So all the way around, Your Honor, I think there's no

1 prejudice certainly to any party or class member or stakeholder
2 for us to just wait and see what transpires over these next two
3 months rather than striking the hearing.

4 **THE COURT:** I humbly suggest that in trying to do
5 so, we turn down the political heat or the personal invective
6 that's going both ways here. Because everyone is in agreement
7 that competency restoration in Oklahoma needs to be fixed.
8 We've had this discussion here on the record, that with the
9 proliferation of methamphetamine I see it every day. It simply
10 increases the mental health problems that exist. We have what
11 we call, you know, "dual-diagnosis treatment," mental health
12 and drugs and I see those cases every day. So the problem is
13 exploding at least in part due to the proliferation of
14 methamphetamine.

15 So everybody here needs to work together in goodwill,
16 if they can, to reach an agreement. But that's not legal;
17 that's just my advice.

18 **MR. DEMURO:** Thank you, Your Honor.

19 **THE COURT:** Yes.

20 **MR. DEMURO:** We agree.

21 **THE COURT:** Yes.

22 **MR. DRUMMOND:** Your Honor, because, as you've
23 identified, we are affected by politics. So I cannot --

24 **THE COURT:** Well, let's not be. Let's be -- let's
25 all be statesmen here.

1 **MR. DRUMMOND:** I cannot in good faith represent that
2 the newly constituted contingency review board would approve it
3 or disprove it.

4 **THE COURT:** Well, sure.

5 **MR. DRUMMOND:** Right.

6 **THE COURT:** But for my purposes, I've been convinced
7 here today, without the benefit of briefing, that I shouldn't
8 strike it with the hopes that perhaps you can get the
9 contingency review board to approve it. Now, if they don't,
10 then we're talking about a legislative approval; correct?

11 **MR. DRUMMOND:** I have a suggestion. Again, speaking
12 of pressure of litigation and the like, I think that you are
13 correct in observing that all rational parties -- and I use
14 that adjective intentionally -- would agree there's a problem
15 that needs to be fixed and that the consent decree is the best
16 mechanism and the most efficient mechanism to correct the
17 deficiency.

18 **THE COURT:** Well, but that's obviously debatable as
19 to the specifics of this consent decree.

20 **MR. DRUMMOND:** I would suggest it's not so debatable
21 but I will yield to the court's observation.

22 **THE COURT:** Well, that's not my job.

23 **MR. DRUMMOND:** Right.

24 **THE COURT:** I am not a policymaker here and I steer
25 away from being a policymaker. Certain people misunderstand

1 the court's role in preliminary approval. I have no opinion as
2 to the wisdom of these changes set forth in the consent decree.
3 My preliminary approval simply is my agreement that it's legal,
4 separate and apart from outpatient competency restoration,
5 which I clearly stated in my order is not permitted under
6 Oklahoma law.

7 **MR. DRUMMOND:** Understood. Hope eternal, a newly
8 constituted CRB approves and we go on down the road. If it
9 doesn't -- and I join Mr. DeMuro in the authenticity and
10 transparency to this court -- we will let you know immediately,
11 if it appears it either won't be convened or has been shot
12 down.

13 I would suggest that the January 15th date be in the
14 alternative. One, a final approval of the consent decree; or
15 two, a hearing on injunctive relief.

16 **THE COURT:** I'm going to wait until either the
17 legislature approves it or the contingency review board
18 approves it. My recollection is that that's what this court
19 did with regard to the Pinnacle Plan, we received the approval
20 of the contingency review board prior to the final approval
21 hearing. There's no reason to go through that process unless
22 we get approval of the legislature or the contingency review
23 board with due respect.

24 **MR. DRUMMOND:** Right. And I anticipate if the
25 speaker or the president pro tem votes against approval of the

1 contingency review board, we can predict with great certainty
2 that that chamber will not join the joint resolution. So I'm
3 just suggesting because --

4 **THE COURT:** Probably. Not that the chamber could
5 possibly override their leadership; right?

6 **MR. DRUMMOND:** Probably not in this state.

7 **THE COURT:** Probably not.

8 **MR. DRUMMOND:** But my concern is not so much
9 Mr. DeMuro's clients, but the victims. That's my concern. I
10 want adjudicative relief to the victims of the state of
11 Oklahoma, and I'm simply suggesting that the court not further
12 delay a hearing on the injunctive relief. This office will
13 answer authentically and transparently on the failures of the
14 State of Oklahoma --

15 **THE COURT:** Well, that's up to you because the
16 consent decree process is separate from an injunctive relief
17 process, all right? I mean, I can candidly reveal to everyone
18 here I received from the Bureau of Prisons a letter on June
19 24th about an individual who is in federal custody down in Fort
20 Worth who they say can be released but no one will take her.

21 **MR. DRUMMOND:** Right.

22 **THE COURT:** Probation doesn't want to supervise her,
23 and one of our magistrate judges is behind this because I'm
24 worried about constitutional rights.

25 **MR. DRUMMOND:** Sure.

1 **THE COURT:** I fully understand your concern and the
2 governor's concern. The governor's mentioned his own concern
3 about this; correct?

4 **MR. DRUMMOND:** Yes.

5 **THE COURT:** Right. So this is something we've got
6 to get a hold of, both on the federal side and the state side.
7 Fortunately my case is not a year old but it's -- there are few
8 months that have passed and I'm concerned about her
9 constitutional rights. I mean, she's in a medical facility at
10 FMC Carswell and I'm going to get her out one way or the other.

11 **MR. DRUMMOND:** Yes.

12 **THE COURT:** Right.

13 **MR. DRUMMOND:** So the state is concerned about the
14 victims' rights and that's why we would like to proceed without
15 any other delay. So Mr. DeMuro and I will confer and probably
16 make a joint application that we proceed on the merits, if it
17 appears as though politically we just can't get there. Thank
18 you, Your Honor.

19 **THE COURT:** All right. We'll keep the matter on the
20 docket for January 15th currently, although I suspect that I'll
21 learn -- if this matter is presented to the newly constituted
22 contingency review board, I'll learn. But I think it's
23 important that something be filed of record because there's
24 been a lot going on in this case in the media and no filings
25 have been made here in court. So if something that is of a

1 legal notice needs to be filed, I'd ask counsel to do so.

2 Now, we need to address these motions that have been
3 filed today. We first received defendant's opposed motion to
4 substitute counsel at docket No. 76. Later this morning we
5 received the attorney general's motion to strike attorney
6 appearances by Mr. O'Connor, Mr. Inbody, Mr. Richer, and
7 Ms. Evans. A couple of preliminary questions there.

8 I've skimmed the briefs that are on file before the
9 Oklahoma Supreme Court in the matter currently pending before
10 the D.C. Federal District Court. The D.C. Federal District
11 Court has certified to the Oklahoma Supreme Court some of these
12 issues which are raised here today, although in a slightly
13 different context because that specifically -- that case
14 involves the governor directly hiring outside counsel to
15 represent him in his official capacity and this is of two
16 agency -- well, the commissioner and then the executive
17 director. So there's a slight difference.

18 So some of my questions are, should I certify this
19 question to the Oklahoma Supreme Court or -- and I saw that the
20 briefing was completed, what, in July; is that correct?
21 There's a request for a hearing but I haven't seen anything
22 further in that case; correct, general?

23 **MR. DRUMMOND:** Correct.

24 **THE COURT:** All right. But I'm posing these
25 questions: Should I certify that question myself because it's

1 in a slightly different context? Because I don't want to wait
2 for the Oklahoma Supreme Court and then have you all say, well,
3 Judge, that's in a different context, you need to decide this
4 insofar as it deals with Ms. Friesen in her official capacity
5 and Ms. Moran in her official capacity. Or, as I say, in the
6 alternative, should I wait for the Oklahoma Supreme Court to
7 make that decision before ruling on these two motions filed
8 today?

9 **MR. DRUMMOND:** I think that's in large part the
10 reason that there's the anti-retention movement. The governor
11 needs three new Supreme Court justices that rule his way. So I
12 think the law is clear and unequivocal --

13 **THE COURT:** Politics --

14 **MR. DRUMMOND:** -- and I'm addressing a former state
15 judge who knows well the laws of Oklahoma. We had a foreign
16 judge in the District of Columbia who I regret now agreeing to
17 the certification because --

18 **THE COURT:** Who was that judge -- or is that judge?
19 Sorry.

20 **MR. DRUMMOND:** He doesn't suffer fools. I know
21 that.

22 **THE COURT:** And so you opposed certification?

23 **MR. DRUMMOND:** No. I believe we -- I'm going to let
24 the solicitor general speak the truth. I will -- I will speak
25 but it may not be accurate.

1 **THE COURT:** Mr. Gaskins, it's a pleasure to have you
2 appear here today, sir.

3 **MR. GASKINS:** Thank you, Your Honor. The U.S.
4 district judge is Timothy J. Kelly in the U.S. District Court
5 for the District of Columbia.

6 **THE COURT:** All right.

7 **MR. GASKINS:** And, yeah, the state -- or the
8 Attorney General's Office is the one that sought the
9 certification there to get some clarity on this issue,
10 especially because it was the attorney general versus the
11 governor issue. That's not necessarily at play here because it
12 is the attorney general taking control of the case from an
13 inferior officer clearly. So --

14 **THE COURT:** Okay. And so if I'm hearing you
15 correctly -- and you're the pointman on that D.C. litigation --
16 you're saying resolution by the Oklahoma Supreme Court of that
17 issue doesn't necessarily resolve the issue here?

18 **MR. GASKINS:** I would say if the Oklahoma Supreme
19 Court ruled in the attorney general's favor, then we would
20 certainly win here, but I would say that we could win here even
21 if the Oklahoma Supreme Court rules against the attorney
22 general.

23 **THE COURT:** Spoken like a true advocate.

24 **MR. GASKINS:** Thank you.

25 **THE COURT:** All right. And I will get to you,

1 Mr. Richer.

2 So can I independently rule, even though I know that
3 the Oklahoma Supreme Court is considering the case involving
4 the governor's representation in the D.C. District Court case?

5 **MR. GASKINS:** I believe you can because the same
6 sort of constitutional issues of the governor versus the
7 attorney general are not necessarily at play here. This is
8 more of a statutory issue. The governor has some slightly
9 different constitutional arguments that he has made in the D.C.
10 case about the attorney general coming in and taking over a
11 case where the governor is a named party. That's not
12 implicated here because the governor, of course, is not a
13 named --

14 **THE COURT:** So you're saying there are no
15 constitutional issues with regard to these two defendants?

16 **MR. GASKINS:** Oh, I would imagine the governor will
17 continue to make constitutional arguments, but I think that any
18 arguments that the governor makes in this case are much weaker
19 than they are at least in the D.C. case. At least in the D.C.
20 case, he's actually the named defendant. In this case, you
21 have two inferior officers, and there are prior Oklahoma
22 Supreme Court cases that make it clear that the attorney
23 general can take over litigation from inferior state officers.
24 There's just nothing about whether the attorney general can
25 take a case over from the governor himself.

1 **THE COURT:** All right. And I've read those briefs
2 that are before the Oklahoma Supreme Court. Then you have the
3 ethical argument. Just as you and I know, if you and I were
4 representing an individual charged with murder, we couldn't
5 take over that individual's case and plead that individual out
6 as guilty if the client doesn't wish to be; right?

7 So, too, even though the Attorney General's Office is
8 given the responsibility to represent an agency or an agency
9 head, can you with a straight face argue to me that if the
10 agency head disagrees with your opinion, that you can override
11 that agency head's position as an attorney?

12 **MR. GASKINS:** Certainly, certainly. An attorney
13 general, not -- this is not a situation where we're talking
14 about a private attorney. We're talking about an individual
15 that has been charged for representing the state so I think we
16 have to identify who the client is first.

17 **THE COURT:** Well, I've seen, you know, the "take
18 control" language.

19 **MR. GASKINS:** Right.

20 **THE COURT:** But you're honestly saying that if you
21 and your client, the agency head, have a distinct disagreement,
22 that you can override the position of your client?

23 **MR. GASKINS:** The client is the State of Oklahoma
24 and so the commissioner and the executive director have been
25 sued in their official capacities. The U.S. Supreme Court has

1 said when a state officer is sued in their official capacities,
2 that's the same as if the state itself has been sued. So the
3 client is the State of Oklahoma. It isn't the commissioner.
4 It isn't the executive director. It's the State of Oklahoma.
5 The Oklahoma legislature under our constitution gets to
6 designate who makes the call on behalf of the State of Oklahoma
7 in litigation.

8 **THE COURT:** But, as I say, I've read these briefs,
9 and one of the arguments made is basically it makes the
10 attorney general the super executive with regard to matters
11 that go into litigation.

12 **MR. GASKINS:** Sure. So whenever you have litigation
13 you have to have someone who's the final decision-maker. The
14 legislature, they could change this at any point, if they so
15 choose. But as we sit here today, the legislature as of 1995
16 has designated the attorney general as the person that gets to
17 make the final call.

18 **THE COURT:** Okay. This is a little premature
19 because I only have the opening briefs. Have you thought
20 about -- since we have two briefs that are filed on the same
21 day here, the normal response to these briefs -- and I have a
22 schedule here before me -- the normal response date would be
23 Friday, November 22nd, with replies due December 6th. Any
24 objection to that schedule?

25 **MR. GASKINS:** I do not have any objection to that

1 schedule. But we are very familiar with these issues, so if
2 the court so chooses, we could get a brief and response much
3 faster than that.

4 **THE COURT:** Well, you got together the opening brief
5 here pretty quickly.

6 **MR. GASKINS:** It was a busy morning, Your Honor.

7 **THE COURT:** I'll bet.

8 **MR. GASKINS:** I don't have any objection to those
9 deadlines, but I'm also happy to entertain a faster schedule,
10 if the court is so inclined.

11 **THE COURT:** Okay. So what happens -- you're taking
12 the position that if the Oklahoma Supreme Court rules in your
13 client's favor, the attorney general, then that will be binding
14 on this court? It would seem to me that you're right because
15 it's a matter of Oklahoma law, both statutory and
16 constitutional law, and not a matter of federal law at all;
17 correct.

18 **MR. GASKINS:** Correct. The --

19 **THE COURT:** So should I because, as you know, we've
20 got a few *McGirt* cases around here -- just had two *McGirt*
21 criminal trials this month. Should we spend our judicial
22 resources on this battle between the executive and the attorney
23 general if the Oklahoma Supreme Court might moot out the issue
24 for me?

25 **MR. GASKINS:** I mean, that is an issue of judicial

1 economy which I'll defer to the court on. But I would say that
2 the court may still have to rule on this issue. If, for some
3 reason, the Oklahoma Supreme Court disagrees with the attorney
4 general, that he cannot take over a case from the governor, the
5 issues here are slightly different because the attorney general
6 is taking over a case technically from an officer that's lower
7 than the governor. It's not -- so, I mean, to me the issues
8 are slightly nuanced that the court may still have to -- if the
9 Oklahoma Supreme Court rules in favor of the governor there,
10 this court, I think, would still have to address the unique
11 circumstances here.

12 **THE COURT:** What of the argument, though, that these
13 two officers are part of the executive and they report to the
14 governor? Neither one of them are constitutional agencies;
15 correct?

16 **MR. GASKINS:** They are not. But we do not have --
17 yeah, we do not have a unitary executive in the State of
18 Oklahoma. We have a -- we have -- the executive office is and
19 the constitutional duties are put on various officers,
20 including the attorney general.

21 **THE COURT:** So I'm just curious to ask it. Let's
22 say your client someday is interested in becoming governor. Is
23 he interested in allowing the attorney general to override his
24 policy decisions by virtue of being attorney general of the
25 state?

1 **MR. GASKINS:** I think the current attorney general
2 is focused on upholding Oklahoma law and the Oklahoma
3 Constitution as it's currently written, and so that is -- I
4 imagine that's all we would expect of a future governor as
5 well. But as I said, the legislature is the one that
6 ultimately has control of who gets to be the final
7 decision-maker. And so as we sit here today, they have decided
8 that the attorney general is the final decision-maker but
9 legislation can change at any point.

10 **THE COURT:** We've had the discussion on the record
11 in this case about the constitutional structure in Oklahoma,
12 where the governor is referred to by political scientists as
13 this is a weak governor system, the governor is vested with
14 fewer powers and authorities than in other states. This would
15 take even more away; correct?

16 **MR. GASKINS:** I think it would just -- it's not
17 taking anything away; it's just interpreting the law as it's
18 currently written. So I don't think he had that authority to
19 begin with.

20 **THE COURT:** All right. Mr. Richer, I'd be pleased
21 to hear your position and come on up, sir. Welcome, sir.

22 **MR. RICHER:** Welcome, sir. Your Honor, John Richer
23 for the defendants. I'll address initially your question on
24 certification.

25 So in our paper that Your Honor read this morning, we,

1 of course, wanted to bring the court's attention to the Supreme
2 Court proceeding. I believe in my review of those pleadings --
3 I have not gone into detail -- but I've read enough and I made
4 a point in our paper to state that I think those are two
5 distinctly different cases. The issue there and the issue here
6 are different.

7 **THE COURT:** I think you're probably right.

8 **MR. RICHER:** And the reason --

9 **THE COURT:** And it seems to me that Mr. Gaskins is
10 agreeing.

11 **MR. RICHER:** I think he does agree. I think the
12 issue is an actual conflict versus a perceived conflict in that
13 case. I think that one way or the other I think the court
14 could decide the issue but this is a distinct Oklahoma law
15 issue. I think you can tell from the papers that we disagree
16 with the attorney general on his authority to represent the
17 commissioner in this case. There's going to be a legal
18 disagreement on that issue under Oklahoma law, under the
19 Oklahoma Constitution, the Oklahoma statutes, and the statutes
20 that we are citing in our paper for other authority and the
21 governor's authority to have appointed my law firm to represent
22 the defendants in this case. The basis of our paper in our
23 request for relief and our clients is a conflict of interest,
24 and those are ethical issues that involve Oklahoma law.

25 My thinking on this, Your Honor, is that this is kind

1 of the 800-pound gorilla in the courtroom. You're going to
2 have to, I believe, Your Honor, respectfully address this issue
3 one way or the other. It kind of goes with the other
4 conversation we had earlier.

5 We represent and we've been appointed by the governor
6 as special counsel to represent our clients. We have a very
7 strong disagreement on the consent decree. That one yard that
8 we kept on hearing about is everything to our client and we do
9 want to work those issues out. But we have to have an
10 agreement or an acknowledgment that we are here properly before
11 the court to represent our client and that issue is now in
12 dispute based on what we've seen this morning.

13 **THE COURT:** Any objection to the briefing schedule
14 that I --

15 **MR. RICHER:** No objection, Your Honor. That is
16 fine.

17 **THE COURT:** All right. We'll set a briefing
18 schedule on these motions. They are separate motions so I know
19 the briefing will overlap, but there will be responses then due
20 on Friday, November 22nd, with replies due on December 6th.

21 Now, following up on Mr. Gaskins' statement, he opines
22 that if the Oklahoma Supreme Court were to decide in the D.C.
23 case the certified question in favor of the attorney general,
24 that would moot this out.

25 If I understand your position, you're saying it's

1 different because here we're dealing with an actual conflict?

2 **MR. RICHER:** That is correct, Your Honor.

3 **THE COURT:** All right. Just so I understand
4 conceptually where you're coming from.

5 **MR. RICHER:** That's correct.

6 **THE COURT:** All right. Is there anything else that
7 would be appropriate to raise today on behalf of your clients?

8 **MR. RICHER:** No, Your Honor. Other than we look
9 forward to representing our clients and trying to get to the
10 100-yard line in this case.

11 **THE COURT:** Thank you.

12 **MR. RICHER:** Thank you.

13 **MR. DEMURO:** Commonly referred to as the "end zone."

14 **THE COURT:** I'm sorry?

15 **MR. DEMURO:** I said commonly referred to as the "end
16 zone," the 100-yard line, Your Honor.

17 **THE COURT:** Okay.

18 **MR. DEMURO:** Your Honor, can I indulge the court?
19 May I have thirty seconds to visit with the general before the
20 court concludes the hearing?

21 **THE COURT:** Of course. Of course.

22 *(Discussion held off the record)*

23 **MR. RICHER:** Having conferred with my client, Your
24 Honor, I think we would respectfully ask the court to certify
25 the question of not only the conflict of interest issue -- it

1 may be a little premature to do that -- but the issue of 51
2 O.S. 200A, which is purely a state law question.

3 **THE COURT:** Okay. You'll need to file a motion to
4 certify. Within that motion to certify, try to craft a
5 question or questions that need to be resolved by the Oklahoma
6 Supreme Court.

7 **MR. RICHER:** We will do so, Your Honor.

8 **THE COURT:** All right. Now, my next question really
9 goes to Mr. DeMuro. Thank you, Mr. Richer.

10 **MR. RICHER:** Thank you, sir.

11 **THE COURT:** Mr. DeMuro, let me back up just one
12 second.

13 I'm reminded that the current deadline to file a motion
14 for final approval is December 9th. So I will need you to file
15 on or before December 9th a notice as to whether or not you
16 have been able to achieve approval by the contingency review
17 board.

18 **MR. DEMURO:** Understood.

19 **THE COURT:** All right. So that will part of the
20 minute order here today, that plaintiffs are required to file
21 on or before December 9th whether or not contingency review
22 board approval has been achieved. Go ahead.

23 **MR. DEMURO:** Yes, Your Honor. I don't want to
24 overwork the football analogy, but we are in November after all
25 in Oklahoma so it's probably apt. But given that there seems

1 to be widespread agreement by everyone involved, including the
2 two -- the governor's recently appointed special counsel,
3 although obviously we object to that appearance here, we're on
4 the one-yard line. I wonder if the court could entertain the
5 suggestion of ordering the parties to an expedited -- I'll use
6 the words "settlement conference" -- with one of our talented
7 magistrates to be done as quickly as possible to focus on
8 whatever that one yard is to see if we can get across the goal
9 line.

10 Because if we can reach -- I know we're going to win
11 this case one way or the other. If we can reach consent decree
12 agreement, it would be worth the troubles of having to redo the
13 Rule 23 process to get agreement of the parties. We would have
14 a much more effective plan.

15 **THE COURT:** Well, now, you've opposed the entry of
16 appearance. Are you saying that these attorneys here could
17 participate? When you say "agreement of the parties," are you
18 limiting yourself to the attorney general, or are you including
19 the party that wishes to be represented by new counsel?

20 **MR. DEMURO:** I would never turn down an opportunity
21 to work with Mr. O'Connor. So I would definitely invite them
22 assuming that the attorney general has no objection --

23 **MR. DRUMMOND:** For purposes of the settlement.

24 **MR. DEMURO:** -- just for purposes of the settlement
25 while preserving -- and I use the word "settlement" which is an

1 odd term in this context, but I think Your Honor knows what I
2 mean.

3 **THE COURT:** Well, it worked in our foster care case.

4 **MR. DEMURO:** So the answer to that question would be
5 yes. It could resolve the thorny issue that has been brought
6 to the court's attention on the representation issue if
7 everyone comes to an agreement about the actual consent decree.

8 So I don't know how much hope I put in it, but, Judge, if
9 we're that close, it seems like it could work.

10 It would need to be done quickly and it would need to
11 be done with, I think, respectfully with one of this court's
12 talented magistrates or someone of a similar stature.

13 **THE COURT:** Right. I'm informed that Magistrate
14 Judge Huntsman does not have criminal duty in November and so
15 that would be a possibility. I can see by a shaking of the
16 head, body language, the attorney general has no objection to
17 that approach; correct?

18 **MR. DRUMMOND:** No objection.

19 **THE COURT:** And what says Mr. Richer?

20 **MR. RICHER:** No objection, Your Honor.

21 **THE COURT:** All right.

22 **MR. DEMURO:** But it would have to be quick and we
23 would all have to mind -- and this idea came to me -- we would
24 have to mind the court's admonishment that we -- me first -- we
25 dial down the rhetoric and we all work in good faith.

1 **THE COURT:** Absolutely. Now, remember, too, that I
2 would not have entered that order with respect to
3 out-of-custody -- or the legality of out-of-custody restoration
4 unless I was convinced that that is Oklahoma law so I don't
5 want any end-around on that. And as I say, I'm not rendering a
6 policy judgment on that at all. But having looked at it
7 closely, the law in my view simply does not allow that
8 currently.

9 **MR. DEMURO:** Your Honor, my view, although
10 technically probably inaccurate, that's law of the case. Your
11 ruling on that has been made. We're not contesting that. That
12 issue will have to be addressed, which we will do, at the
13 legislative level with the legislature. But no intention there
14 of trying to clawback that ruling at all. That's over.

15 **THE COURT:** All right. I'm going to have counsel,
16 lead counsel, meet me in chambers. We'll talk about a
17 potential settlement judge, all right? Is there anything else
18 that we need to talk about here today?

19 **MR. DEMURO:** Nothing from the plaintiff.

20 **MR. DRUMMOND:** Nothing from the state.

21 **MR. RICHER:** Nothing, Your Honor.

22 **THE COURT:** Very good. If there's nothing further,
23 we are adjourned. Thank you.

24 *(The proceedings were concluded)*
25

C E R T I F I C A T E

I, Brian P. Neil, a Certified Court Reporter for the Northern District of Oklahoma, do hereby certify that the foregoing is a true and accurate transcription of my stenographic notes and is a true record of the proceedings held in above-captioned case.

I further certify that I am not employed by or related to any party to this action by blood or marriage and that I am in no way interested in the outcome of this matter.

In witness whereof, I have hereunto set my hand this 7th day of November 2024.

s/ Brian P. Neil

Brian P. Neil, RMR-CRR
United States Court Reporter